

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

EDWARD MARTIN SAENZ, JR.	)	Civil No. 08-CV-0566-WQH (JMA)
	)	
Petitioner,	)	
	)	
v.	)	<b>REPORT AND RECOMMENDATION RE</b>
	)	<b>MOTION TO DISMISS PETITION FOR</b>
	)	<b>WRIT OF HABEAS CORPUS</b>
SECRETARY OF THE DEPT. OF CORR.	)	
AND REHAB., et al.,	)	
	)	
Respondents.	)	
	)	
	)	

**1. Introduction And Procedural Background.**

Petitioner is a state parolee. On June 23, 2003, he pled guilty to one count of a lewd act upon a child in violation of Cal. Penal Code § 288(a). (Rspt.'s Lodgment Nos. 1 & 3.) On July 22, 2003, the court sentenced Petitioner to three (3) years in state prison. (Rspt.'s Lodgment No. 4.) Petitioner did not appeal his conviction. (Third Amended Petition [doc. no. 10] at ¶¶ 10-13.)

//

//

1       Petitioner waited almost four (4) years before filing the  
2 first of three state petitions for collateral review. (See  
3 Rspt.'s Lodgment Nos. 5, 7, & 9.) On July 20, 2007, Petitioner  
4 filed a Petition for Writ of Habeas Corpus in San Diego Superior  
5 Court (Case No. HC 19005), contending that he was entitled to be  
6 excused from lifetime sex-offender registration under Cal. Penal  
7 Code § 290. (Rspt.'s Lodgment No. 5.) That court denied the  
8 petition on September 11, 2007. (Rspt.'s Lodgment No. 6.) On  
9 October 10, 2007, Petitioner filed a Petition for Writ of Habeas  
10 Corpus in the California Court of Appeal (Case No. DO51810),  
11 raising the same claim raised in his petition filed in the  
12 superior court. (Rspt.'s Lodgment No. 7.) On January 31, 2008,  
13 that court denied the petition. (Rspt.'s Lodgment No. 8.)

14       On February 14, 2008, Petitioner attempted to file a Peti-  
15 tion for Review in the California Supreme Court (Case No.  
16 S161199), raising the same claim raised in his state petitions  
17 for collateral review. (Rspt.'s Lodgment No. 9.) The record  
18 reflects that the California Supreme Court rejected the petition  
19 on procedural grounds, and Petitioner filed an Application for  
20 Relief from Default on February 26, 2008. (Id.) On March 3,  
21 2008, that court denied Petitioner's application and returned his  
22 Petition for Review to him. (Rspt.'s Lodgment No. 10.)

23       On March 25, 2008, Petitioner filed his first Petition for  
24 Writ of Habeas Corpus in United States District Court, contending  
25 that he is entitled to be excused from lifetime sex-offender  
26 registration under Cal. Penal Code § 290. (Petition [Dkt. No.  
27 1].) After the Court ordered the Petition dismissed without  
28 prejudice and with leave to amend for multiple procedural defi-

ciencies [Dkt. No. 3], on April 23, 2008, Petitioner filed a First Amended Petition raising the same claim. [Dkt. No. 6] On May 5, 2008, the Court dismissed that petition without prejudice and with leave to amend [Dkt. No. 7] and, on May 21, 2008, Petitioner filed a Second Amended Petition. [Dkt. No. 8] After the Court ordered the Second Amended Petition dismissed without prejudice and with leave to amend on June 5, 2008 [Dkt. No. 9], Petitioner filed a Third Amended Petition on July 8, 2008. [Dkt. No. 10]

On September 10, 2008, Respondent filed a Motion to Dismiss the Third Amended Petition, contending that it is time-barred by the one-year statute of limitations set out in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)<sup>1</sup>. [Dkt. No. 16.] Petitioner did not file an Opposition to the Motion to Dismiss.

As discussed below, the Third Amended Petition should be dismissed with prejudice because it is time-barred.

## **2. The Third Amended Petition Is Time-Barred Under The AEDPA.**

The Third Amended Petition should be dismissed. The AEDPA's statute of limitations applies to Petitioner's presentation of

---

<sup>1</sup>28 U.S.C. § 2244(d)(1) states: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of – (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

claims in this Court. Calderon v. U.S. District Court (Beeler),  
 128 F.3d 1283, 1286-1287 (9th Cir. 1997), as amended on denial of  
rehq. and rehq. en banc, cert. denied, 522 U.S. 1099 (1998),  
overruled on other grounds in Calderon v. U.S. District Court,  
 163 F.3d 530 (9th Cir. 1998), cert. denied, 523 U.S. 1063 (1999).  
 Because he did not file a direct appeal, Petitioner's conviction  
 became final on September 20, 2003, 60 days after he was sen-  
 tenced in state court on July 22, 2003. (Cal. Rules of Court,  
 Rule 8.308; Lewis v. Mitchell, 173 F.Supp.2d 1057, 1060 (C.D.  
 Cal. 2001)). Accordingly, absent any applicable tolling,  
 Petitioner had until September 21, 2004 to file his federal  
 habeas Petition.<sup>2</sup> Id.; see Patterson v. Stewart, 251 F.3d 1243  
 (9<sup>th</sup> Cir. 2001)(Rule 6(a), F.R.Civ.P., governs the calculation of  
 the 1-year statute of limitations period of the AEDPA).

As set forth above, Petitioner did not file his original  
 federal Petition until March 25, 2008, three and one-half (3½)  
 years after the statute of limitations had expired on September  
 21, 2004. Because the 1-year statute of limitations had already  
 expired when Petitioner filed his first federal petition in this  
 Court, the Third Amended Petition is time-barred.

//

//

---

<sup>2</sup>Petitioner did not file his petition for writ of habeas corpus  
 in San Diego Superior Court until July 20, 2007, almost three (3)  
 years after the federal statute of limitations had expired on  
 September 21, 2004. Thus, the pendency of that petition, or any other  
 petition filed subsequently by Petitioner, could not toll the already-  
 expired limitations period pursuant to 28 U.S.C. § 2244(d)(2). See  
Calderon v. U. S. District Court, 128 F.3d 1283, 1287 (9<sup>th</sup> Cir. 1997),  
overruled in part on other grounds by Calderon v. U.S. District Court,  
 163 F.3d 530 (9<sup>th</sup> Cir. 1998).

1 **3. Conclusion and Recommendation.**

2 After a thorough review of the record in this matter, the  
3 undersigned magistrate judge finds that Petitioner did not timely  
4 file his Petition under the AEDPA. Therefore, this Court hereby  
5 recommends that Respondent's Motion to Dismiss the Petition be  
6 **GRANTED**, the Third Amended Petition be **DISMISSED WITH PREJUDICE**,  
7 and that judgment be entered accordingly.

8 This Report and Recommendation is submitted to the Honorable  
9 William Q. Hayes, United States District Judge assigned to this  
10 case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

11 **IT IS ORDERED** that not later than December 12, 2008, any  
12 party may file written objections with the Court and serve a copy  
13 on all parties. The document should be captioned "Objections to  
14 Report and Recommendation."

15 **IT IS FURTHER ORDERED** that any reply to the objections shall  
16 be served and filed not later than December 29, 2008. The  
17 parties are advised that failure to file objections within the  
18 specified time may waive the right to raise those objections on  
19 appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449,  
20 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir.  
21 1991).

22 **IT IS SO ORDERED.**

23 DATED: November 21, 2008

24   
25 Jan M. Adler  
26 U.S. Magistrate Judge  
27  
28